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No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, Warden,

Petitioner,

-against-

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a decision by the Supreme Court of Georgia which declared unconstitutional one of Georgia's statutory aggravating circumstances -- one that respondent's jury expressly designated in its sentencing verdict -- creates an unacceptable risk that respondent's jury may have recommended his death sentence at least in partial reliance upon that unconstitutional ground?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Alpha Otis O'Daniel Stephens respectfully requests that the Court deny the petition for a writ of certiorari filed on July 14, 1981 by petitioner Walter Zant, seeking review of the Fifth Circuit's opinion in this case. This brief in opposition is being filed within 30 days after receipt of the petition, as provided by Rule 22.1 of the Rules of the Court.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the opinion of the Court of Appeals appended to the certiorari petition, at A. 1-4, 34-37.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS REVERSED RESPONDENT'S DEATH SENTENCE IN PROPER ADHERENCE TO A CONSTITUTIONAL PRINCIPLE FIRMLY ESTABLISHED BY PRIOR DECISIONS OF THIS COURT.

At least since its decision in 1931 in Stromberg v. California, 283 U.S. 359, 367-38 (1931), this Court has consistently maintained that, in a case where a jury has been instructed to consider several grounds for conviction, one of which proves unconstitutional, any verdict that prevents a reviewing court from subsequently determining whether the jury may have relied on the unconstitutional ground must be set aside. Williams v. North Carolina, 317 U.S. 287, 291-92 (1942); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). As the Court explained in Street v. New York, supra, 394 U.S. at 587-88:

> "[E]ven assuming that the record precludes the inference that appellant's conviction might have been based solely on [the unconstitutional ground], we are still bound to reverse if the conviction could have been based upon both [the unconstitutional] and [the constitutional ground].
>
> * * *
>
> [U]nless the record negates the possibility that the conviction was based on both . . . '[t]he judgment . . . must be affirmed as to both or as to neither,' [for otherwise] . . . there is an unacceptable danger that the trier of fact will have regarded the two . . . as 'intertwined' and have rested the conviction on both together."

Under Georgia law, respondent's trial jury was responsible after his conviction for determining whether he would receive a life sentence or death sentence. Ga. Code Ann. §§27-2503(b); 27-2534.1(c). Following statutory procedures carefully designed in response to this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) to guide and channel

the jury's sentencing deliberations, respondent's jury was precluded from imposing a death sentence unless it found at least one aggravating circumstance, Ga. Code Ann. §§26-3102; 27-2534.1(b), and thereafter unanimously chose to recommend that a penalty of death be inflicted on respondent. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Georgia law, however, clearly provided that, even if aggravating circumstances were found, respondent's jury nevertheless retained full authority to recommend imposition of a life sentence, Ga. Code Ann. §26-3102; see, e.g., Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978); Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977). The jury's responsibility, before fixing respondent's punishment, was "to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the . . . statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b).

Respondent's jury was expressly charged to consider four statutory aggravating circumstances, and, if it recommended a death sentence, to return a verdict designating each aggravating circumstance which it found proven beyond a reasonable doubt (Trial Tr. 320-22).*/ Respondent's jury did recommend a sentence of death and, in its verdict, the jury expressly found three statutory aggravating circumstances, among them Ga. Code Ann. §27-2534.1(b)(1), that "[t]he offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions" (Trial Tr. 326).

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*/ Each reference to the transcript of respondent's trial which took place on January 20-21, 1975 in the Superior Court of Bleckley County, Georgia, is indicacted by the abbreviation "Trial Tr."

Prior to the appeal of respondent's case, the Supreme Court of Georgia, in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), struck down this "(b)(1)" statutory aggravating circumstance as "unconstitutionally vague," holding that it did not "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty," Arnold v. State, supra, 236 Ga. at 541, 224 S.E.2d at 391. Nevertheless, on respondent's appeal, without ever adverting to this Court's line of decisions beginning with Stromberg v. California, or the constitutional principle announced therein, the Supreme Court of Georgia upheld respondent's sentence, reasoning simply that "the evidence supports the jury's finding of the other statutory aggravating circumstances, and consequently the sentence is not impaired." Stephens v. State, 237 Ga. 259, __, 227 S.E.2d 261, 263 (1976). On respondent's state habeas corpus appeal, again without reference to the Stromberg principle, the Georgia Supreme Court once more reaffirmed respondent's sentence. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978).

The Court of Appeals, however, did properly consider the principle long ago announced by this Court in Stromberg stating:

> "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance . . . It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty for the . . . invalid ground."

(A. 407). In light of controlling constitutional considerations, and in view moreover of this Court's special insistence in capital cases that any risk of an arbitrary sentence be minimized (A. 39, 41), the Court of Appeals reversed respondent's

sentence.

The opinion of the Court of Appeals is strongly reinforced by this Court's recent opinion in Godfrey v. Georgia, 446 U.S. 420, 428 (1980), in which the Court repeated its insistence that, to comply with Eighth Amendment requirements, a capital sentencing statute "must channel the [jury's] discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" (emphasis added), observing that otherwise, "the jury's interpretation [of sentencing issues on appeal] can only be the subject of sheer speculation." Id. at 429.*/

Certiorari, in sum, would be inappropriate in this case, since the Court of Appeals did no more than correctly consider and apply a well-established principle of constitutional law. The failure of the Supreme Court of Georgia in its two Stephens opinions to address either the principle itself or this Court's long line of controlling opinions on the subject creates no "clear conflict of law," as petitioner maintains, but rather evidences only a

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*/ Petitioner raises two additional points which require only a brief response. At pages 12-13 of his petition for certiorari, petitioner attempts to create a constitutionally significant distinction between the "general verdicts of guilty" at issue in the Stromberg line and the "penalty verdict" at issue here. This Court's opinion during this past Term in Bullington v. Missouri, __U.S. __, 68 L.Ed.2d 270 (1981) rejects such a distinction.

Petitioner also suggests that this Court in Gregg v. Georgia, 428 U.S. 153 (1976) approved a sentence imposed on the basis of aggravating circumstances some of which were later held unconstitutional. In fact, the Court noted only that "the death sentences imposed [on Gregg] for armed robbery . . . were vacated on the grounds that . . . the jury improperly considered the murder as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murder." Gregg v. Georgia, supra, 428 U.S. at 161-62. No similarly erroneous aggravating circumstances were considered by Gregg's jury in imposing his sentence for murder.

constitutional error on the part of a state court which was identified and corrected by the Court of Appeals.*/

II.

EVEN IF CERTIORARI WERE OTHERWISE APPROPRIATE, THE INSTANT CASE IS AN INAPPROPRIATE ONE FOR RESOLUTION OF THIS ISSUE.

Despite the well-established constitutional principles relied upon by the Court of Appeals in reversing respondents' death sentence, petitioner has found in this Court's denial of certiorari in Westbrook v. Balkcom, __U.S.__, 66 L.Ed.2d 298 (1980), an indication that the Court might disagree with the Court of Appeals on this issue. Even if the statements by two Justices of the Court which accompanied the denial of certiorari in Westbrook do signify a willingness to consider anew the application of Stromberg to capital sentencing verdicts, a significant factor renders the present case an inappropriate vehicle for the Court's review. As the Court of Appeals noted in its opinion, at least three significant constitutional issues concerning respondent's guilt were not considered by the district court. The Court of Appeals has remanded the case to the district court to address these issues (A. 42). The Court of Appeals' judgment, therefore, is not final. Any subsequent reversal of respondent's conviction by the lower court would, under Georgia law, require a new trial on both guilt or innocence and on sentence, obviating any need to resolve the sentencing issues presented here. Cf. Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook R.R., 389 U.S. 327 (1967).

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*/ Petitioner has cited a number of subsequent cases in which the Supreme Court of Georgia has followed its opinion in Stephens on this issue. In none of those cases did that court address either the principle announced in Stromberg or the Stromberg line of cases themselves.

CONCLUSION

For the reasons set forth above, respondent prays that the petition for a writ of certiorari be denied.

Dated: August 14, 1981.

Respectfully submitted,

s/ James C. Bonner, Jr.

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-against-

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am co-counsel for respondent and am a member of the bar of the Supreme Court of the United States, and that I served this brief in opposition on petitioner by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Harrison Kohler, Esq.
Assistant Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334

All parties required to be served have been served. Done this 14th day of August, 1981.

John Charles Boger

JOHN CHARLES BOGER

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Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, Alpha Otis O'Daniel Stephens, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the respondent, who is presently incarcerated at the Georgia Diagnostic & Classification Center in Jackson, Georgia. Mr. Stephens' affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

/s/ James C. Bonner, Jr.

JAMES C. BONNER, JR.
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475 North Lumpkin Street
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ATTORNEY OF RECORD

No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, WARDEN, Petitioner, -against- ALPHA OTIS O'DANIEL STEPHENS, Respondent.	AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

JOHN CHARLES BOGER, being duly sworn, states:

1. I am co-counsel for Alpha Otis O'Daniel Stephens, the respondent in the above-captioned action, and I make this affidavit in support of Mr. Stephens' motion for leave to proceed in forma pauperis. My representation of Mr. Stephens is without remuneration.

2. Mr. Stephens is presently in the custody of the State of Georgia and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Stephens by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Stephens is attached hereto.

3. Counsel was appointed to represent Mr. Stephens at his trial and on appeal. Volunteer counsel have represented Mr. Stephens throughout his federal habeas corpus proceedings, and Mr. Stephens has been permitted by the lower federal courts to proceed in forma pauperis.

4. I am informed and believe that because of his

poverty, Mr. Stephens is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Stephens is entitled to prevail in this action.

John Charles Boger
JOHN CHARLES BOGER

Sworn to before me this
14th day of August, 1981

NOTARY PUBLIC

JOEL BERGER
Notary Public, State of New York
No. 31-0281197
Qualified in New York County
Commission Expires March 30, 1982

No. 81-89

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, Warden,	:	
Petitioner,	:	
-against-	:	
ALPHA OTIS O'DANIEL STEPHENS,	:	AFFIDAVIT
Respondent.	:	
	:	

I, Alpha Otis O'Daniel Stephens, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Bleckley County, a trial court of the State of Georgia, of murder and was sentenced to death. I am being held at the Georgia Diagnostic

& Classification Center in Jackson, Georgia. I believe that the United States Court of Appeals for the Fifth Circuit was correct in vacating my death sentence and that both my conviction and my death sentence were imposed upon me in violation of my constitutional rights.

_____
ALPHA OTIS O'DANIEL STEPHENS

STATE OF GEORGIA
COUNTY OF BUTTS

The foregoing affidavit of Alpha Otis O'Daniel Stephens was subscribed and sworn to before me this day of .

_____
NOTARY PUBLIC